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BELLAJADE SDN BHD v. CME GROUP BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABANG ISKANDAR JCA
ZAMANI A RAHIM JCA

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[CIVIL APPEAL NO: W-02(IM)(NCVC)-976-06-2015]
12 OCTOBER 2016

CONTRACT: *Agreement – Tenancy agreement – Breach – Tenant defaulted in payment of rental – Claim for recovery of outstanding and remaining rentals by landlord – Tenancy contravened express condition of title of land where premises were built on – Whether tenant aware of contravention of express condition of title when it entered into tenancy agreement – Whether tenancy agreement valid – Whether tenancy agreement a contract discovered to be void within meaning of s. 66 of Contracts Act 1950 – Whether tenant liable to pay outstanding rental due under tenancy agreement – Whether tenant entitled to recover payments of rental previously made*

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The appellant ('the plaintiff') entered into a tenancy agreement for an office building ('the premises') with the first respondent ('the first defendant') for a three-year term at a rental of RM1,018,750 per month. The performance of the tenancy agreement was guaranteed by the second respondent ('the second defendant'). The first defendant paid rental for six months only and later defaulted in payment. The plaintiff commenced an action at the High Court against the defendants for the recovery of (i) outstanding rentals in the sum of RM8,401,756.85; and (ii) remaining rentals for the three-year tenancy. The first defendant counterclaimed for a refund of RM9,411,062.50, being rentals and utility and rental deposit paid. The Judicial Commissioner ('the JC') dismissed the plaintiff's claim on the ground that the tenancy and guarantee agreements were illegal and *void ab initio* as they contravened the express condition of title of the land where the premises were built on. The JC was of the view that the fact that the process of conversion had been commenced did not change the fact that the express condition of title prohibited the use of the building for the purposes specified in section H of Schedule 1 of the tenancy agreement. The first defendant's counterclaim was allowed on the ground that it did not know of the contravention of the express condition of title when it entered into the tenancy agreement and as such, the tenancy agreement was a contract that was void within the meaning of s. 66 of the Contracts Act 1950 ('the Act'). Hence, the present appeal by the plaintiff. The issues highlighted for the court's consideration were (i) whether the tenancy agreement was illegal and *void ab initio* on the basis that the use of the premises contravened an express condition of title; and (ii) whether the first defendant was liable to pay the outstanding rental due under the tenancy agreement or whether it was entitled to recover payments of rental previously made.

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Held (allowing appeal with costs; setting aside decision of High Court) A
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) At the time the plaintiff entered into the tenancy agreement with the first defendant or at the inception of the tenancy agreement, the express condition had, for all intents and purposes, been changed from 'residential' to 'commercial' and 'mixed development'. When the B tenancy agreement was signed, the full premium payable for the conversion of land use had been paid. It was not quite accurate to state that the process of conversion had been commenced when, based on the facts, the process of conversion was essentially completed at the time the tenancy agreement was entered into, save for the formalities of C endorsement of change in the express condition in the newly issued document of title. (paras 42, 43 & 46)

(2) With the fulfilment of the condition of approval by the plaintiff, the previous express condition of 'residential' endorsed on the old titles of the land had, in reality, been extinguished and replaced with the new D express condition of 'commercial' and 'mixed development'. Well before the tenancy agreement commenced, the express condition had changed upon approval of the application for change by the State Authority and upon fulfilment of all conditions imposed including the payment of premium of RM1,531,179. (paras 48 & 60) E

(3) Contrary to the findings of the JC, the tenancy agreement was not tainted with illegality as (i) it was not forbidden by law; and/or (ii) it was not of such a nature that if permitted, it would defeat the law applicable, namely the National Land Code. The approval by the State Authority of the change of use coupled with the fulfilment of the conditions F imposed upon such approval, in particular the full payment of the premium imposed for conversion effectively and substantively resulted in a change of use of the land. (paras 74 & 75)

(4) The tenancy agreement was valid and enforceable. The defendant's counterclaim was no longer viable and therefore dismissed. The JC's G finding that the first defendant did not know of the contravention of the express condition at the time it entered into the tenancy agreement was erroneous. Where s. 66 of the Act is applied to an agreement discovered to be void, the court must examine the facts of the case to determine whether the party was aware of the illegality at the time the agreement H was entered into. In order to invoke s. 66 of the Act, the invalidity of the agreement should be discovered subsequent to its making. The section only applies where a party enters into an agreement under the belief that it was legal, and not where the illegality was known from the beginning. Constructive knowledge of the breach of the express I condition, at the time the tenancy agreement was entered into, could be

A imputed upon the first defendant, thus rendering the latter *in pari delicto*. As such, the first defendant was precluded from seeking recourse by virtue of restitution under s. 66 of the Act. (paras 89, 90 & 94)

Bahasa Malaysia *Headnotes*

B Perayu ('plaintif') dan responden pertama ('defendan pertama') telah memeterai satu perjanjian sewa bangunan pejabat ('premis') bagi tempoh tiga tahun dengan sewa sebanyak RM1,018,750 sebulan. Pelaksanaan perjanjian sewa ini dijamin oleh responden kedua ('defendan kedua'). Defendan pertama membayar sewa untuk enam bulan sahaja dan kemudian ingkar membayar. Plaintif memulakan tindakan di Mahkamah Tinggi terhadap
C defendan-defendan untuk mendapatkan semula (i) jumlah sewa terhutang berjumlah RM8,401,756.85; dan (ii) baki jumlah sewa untuk tiga tahun. Defendan pertama menuntut balas pemulangan RM9,411,062.50, bagi sewa dan utiliti dan wang pendahuluan sewa yang dibayar. Pesuruhjaya Kehakiman ('PK') menolak tuntutan plaintif atas alasan perjanjian sewa dan
D jaminan tidak sah dan terbatal *ab initio* kerana bercanggah dengan terma nyata hak milik tanah di atas mana premis tersebut terbina. Pesuruhjaya Kehakiman berpendapat fakta bahawa proses tukar syarat telah bermula tidak menukar fakta bahawa terma nyata hak milik menghalang penggunaan bangunan bagi tujuan yang dinyatakan dalam seksyen H Jadual 1 perjanjian
E sewa. Tuntutan balas defendan pertama dibenarkan atas alasan defendan pertama tidak mengetahui terdapat pelanggaran terma nyata hak milik semasa memasuki perjanjian sewa dan dengan itu, perjanjian sewa adalah kontrak yang terbatal dalam maksud s. 66 Akta Kontrak 1950 ('Akta'). Oleh itu, timbul rayuan ini oleh plaintif. Isu-isu yang diutarakan bagi
F pertimbangan mahkamah adalah (i) sama ada perjanjian sewa tidak sah dan terbatal *ab initio* atas alasan penggunaan premis tersebut melanggar terma hak milik; dan (ii) sama ada defendan pertama bertanggungan membayar jumlah sewa terhutang bawah perjanjian sewa atau sama ada defendan pertama berhak mendapat semula jumlah sewa yang telah dibayar.

G **Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan Mahkamah Tinggi)**
Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

(1) Semasa plaintif memeterai perjanjian sewa dengan defendan pertama
H atau pada permulaan perjanjian sewa, terma nyata telah, bagi semua niat dan tujuan, ditukar daripada 'kediaman' kepada 'komersial' dan 'pembangunan bercampur'. Apabila perjanjian sewa ditandatangani, premium tukar syarat yang perlu dibayar bagi penggunaan tanah telah pun dibayar. Kurang tepat untuk menyatakan proses tukar syarat telah
I bermula sedangkan, berdasarkan fakta, proses tukar syarat disempurnakan semasa perjanjian sewa dimeterai, kecuali beberapa formaliti pengendorsan penukaran terma nyata dalam dokumen hak milik yang baru dikeluarkan.

(2) Dengan pemenuhan syarat kebenaran oleh plaintif, terma nyata terdahulu iaitu 'kediaman' yang diendors pada hak milik lama tanah telah, secara realiti, terpadam dan diganti dengan terma nyata baharu iaitu 'komersial' dan 'pembangunan bercampur'. Lama sebelum perjanjian sewa bermula, terma nyata bertukar melalui permohonan penukaran syarat Pihak Berkuasa Negeri dan dengan pemenuhan kesemua syarat termasuk bayaran premium RM1,531,179.

(3) Bertentangan dengan dapatan PK, perjanjian sewa tidak tercemar dengan ketidaksahan kerana (i) tidak dilarang undang-undang; dan/atau (ii) tidak bersifat, jika dibenarkan, mengatasi undang-undang terpakai, khususnya Kanun Tanah Negara. Kebenaran Pihak Berkuasa Negeri untuk menukar syarat ditambah dengan pemenuhan syarat-syarat yang dikenakan berikutan kebenaran tersebut, khususnya bayaran penuh premium yang dikenakan bagi tukar syarat, secara efektif dan substantif, menyebabkan penukaran syarat penggunaan tanah.

(4) Perjanjian sewa sah dan berkuat kuasa. Tuntutan balas defendan tidak lagi berdaya maju dan dengan itu ditolak. Dapatan PK bahawa defendan pertama tidak tahu tentang pelanggaran terma nyata semasa memeterai perjanjian sewa adalah satu kekhilafan. Jika s. 66 Akta terpakai pada perjanjian yang didapati tidak sah, mahkamah mesti memeriksa fakta kes untuk memastikan sama ada pihak tersebut sedar akan ketidaksahan itu semasa perjanjian dimeterai. Untuk membangkitkan s. 66 Akta, ketidaksahan perjanjian mesti disedari berikutan meterainya. Seksyen ini hanya terpakai apabila pihak memeterai perjanjian atas kepercayaan perjanjian tersebut sah dan bukan apabila ketidaksahan diketahui dari awal lagi. Pengetahuan konstruktif pelanggaran terma nyata pada masa meterainya perjanjian sewa boleh dikaitkan dengan defendan pertama, menjadikannya turut sama bersalah. Oleh itu, defendan pertama dikecualikan daripada memohon bantuan melalui pengembalian asal bawah s. 66 Akta.

Case(s) referred to:

Ahmad Udoh & Anor v. Ng Aik Chong [1969] 1 LNS 5 FC ***(refd)***

Arumugam v. Somasundaram [1933-34] FMSLR 322 ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***

Dr Ti Teow Siew & Ors v. Pendaftar Geran-Geran Tanah Negeri Selangor [1981] CLJ 134A; [1981] CLJ (Rep) 142 HC ***(refd)***

Government of the State of Negeri Sembilan v. Yap Chong Lan & Ors And Another Case [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144 FC ***(refd)***

Moti Chand v. Ikram-Ullah Khan AIR 1916 PC 59 ***(refd)***

North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor [2011] 2 CLJ 392 CA ***(dist)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***

A *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd [2014] 3 CLJ 141 FC* ***(refd)***
Toh Huat Khay v. Lim A Chang [2010] 7 CLJ 261 FC ***(refd)***
Wong Yoon Chai v. Lee Ah Chin [1980] 1 LNS 132 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24(a), (b), 66
B National Land Code, ss. 78(3), 81, 82, 124(1)(a), (b), (c), (2), (4), (5), (7), 124A, 128, 137, 142, 148, 197, 200, 204D, 204E

For the appellant - M Pathmanathan & Michele Navinder Kaur; M/s Sun & Michele
For the 1st respondent - K Kirubakaran; M/s Kiru & Yong
For the 2nd respondent - KY Sim; M/s Faizul Nasir & Assocs

C *[Editor's note: For the High Court judgment, please see Bellajade Sdn Bhd v. CME Group Bhd & Anor [2015] 7 CLJ 343 (overruled).]*

Reported by Najib Tamby

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JUDGMENT

Alizatul Khair Osman JCA:

Introduction

E **[1]** The appeal before us is against the decision of the learned Judicial Commissioner who had on 20 May 2015 dismissed the appellant's (the plaintiff in the court below) claim against both the first and second respondents (the first and second defendants respectively in the High Court) and allowed the first respondent's counterclaim for a refund of RM9,411,062.50 being rentals and utility and rental deposit already paid by
F the first defendant to the plaintiff together with costs and interest.

[2] The appellant's claim against the first respondent in the High Court was for arrears of rent due and rentals for the remainder of a three-year tenancy agreement entered into between the appellant and the first
G respondent on 21 February 2013, in the amount of RM8,401,756.85. Although the tenancy agreement was dated 21 February 2013 the commencement date was deemed to be on 20 February 2013.

[3] The appellant also sued the second respondent as guarantor under the guarantee of tenancy agreement which was executed on the same day as the
H tenancy agreement.

[4] For the purpose of this judgment, parties will be referred to as they were referred to in the High Court.

Brief Facts

I **[5]** The plaintiff, Bellajade Sdn Bhd, is the registered owner of a 23 storey office building together with four levels of basement consisting of 453 car parking bays and 46 motorcycle parking bays called Plaza Palas located in Lorong Palas, off Jalan Ampang, Kuala Lumpur (the said premises). The said

premises were purchased by the plaintiff from one, Orion Choice Sdn Bhd (Orion) for the sum of RM139,250,000 *vide* sale and purchase agreement dated 26 March 2012. The said premises were located on nine pieces of land (the land). The sale and purchase agreement was completed on 20 February 2013. On 21 February 2013, the plaintiff entered into a tenancy agreement with the first defendant, CME Sdn Bhd, for a three-year term (the tenancy agreement).

[6] Pursuant to the tenancy agreement, the first defendant agreed to rent from the plaintiff the said premises at a rental of RM1,018,750 per month for a fixed term of three years commencing from the date of completion of the sale and purchase agreement, that is, on 20 February 2013. Under the terms of the tenancy agreement, the first defendant was deemed to have taken possession of the said premises upon completion of the sale and purchase agreement. The learned Judicial Commissioner (JC) had, prior to the trial determined as a preliminary point of law that the sale and purchase agreement had been completed despite the existence of certain disputes between the plaintiff and the previous owner Orion.

[7] The performance of the tenancy agreement was guaranteed by the second defendant, Tan Sri Dato' Lim Cheng Pow pursuant to a guarantee of tenancy agreement executed on the same day as the tenancy agreement.

[8] The first defendant entered into possession of the said premises on 21 February 2013 and paid rental for only six months amounting to RM6,110,100. The first defendant failed and defaulted in the payment of rental for the period beginning May 2013.

[9] The plaintiff then filed this suit (the subject matter of this appeal) seeking recovery of rentals. The total amount outstanding in overdue rentals and interest due thereon at the time of filing this suit was RM8,401,756.85 and this is the amount claimed by the plaintiff in their statement of claim. The plaintiff is also claiming rentals for the remainder of the three-year tenancy.

[10] The plaintiff's claim is against both the tenant (ie, the first defendant) and the guarantor (the second defendant).

The Findings Of The High Court

[11] As stated earlier the learned JC had, at the conclusion of the trial, dismissed the plaintiff's claim against both the first and second defendants and allowed the first defendant's counterclaim.

[12] In dismissing the plaintiff's claim against the first defendant, the learned JC found essentially that the tenancy agreement was illegal and void *ab initio* as it had contravened the express condition of title of the land. As found by the learned JC:

> The Tenancy Agreement was illegal on the basis that the contemplated use of the premises contravened the express condition of title for the land.

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> The Tenancy Agreement was accordingly void, and Bellajade may not claim for the arrears in rental from CME …

[13] Premised on the same reason, the learned JC found the guarantee of tenancy agreement by the second respondent was also null and void. He held as follows:

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> The threshold issue that arose in connection with the Guarantee was whether the obligations hereunder fell away as a consequence of finding that the Tenancy Agreement was null and void.

[14] Although he found that the guarantee agreement was on its true construct a contract of guarantee and indemnity and that consequentially "the

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fact of the invalidity of the tenancy agreement did not invalidate the guarantee", he nevertheless concluded that the plaintiff cannot be allowed to claim against the guarantor (ie, the second respondent) "because Bellajade had participated in the illegality that had rendered the tenancy agreement void."

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[15] In respect of the counterclaim by the first defendant, the learned JC found as a matter of fact that the first defendant did not know of the contravention of the express condition of title at the time it entered into the tenancy agreement. As such "s. 66 of the Contracts Act 1950 applies, in that

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the tenancy agreement was a contract that was "discovered to be void" within the meaning of s. 66. CME may therefore claim for the return of the rental payment previously made to Bellajade"

[16] In arriving at his decision, the learned JC relied almost entirely on the Federal Court decision of *Singma Sawmill Co Sdn Bhd v. Asian Holdings*

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(Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96; [1980] 1 MLJ 21 FC *(Singma)*.

[17] According to the learned JC the facts in the aforesaid case are "directly on point to the issues at hand."

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[18] The facts in *Singma* as narrated by the learned JC in his judgment were as follows:

> The plaintiff sought to recover arrears of rent from the defendant tenant, who had been let a portion of the plaintiff's land "solely for the purpose of operating a factory". The defendant ceased to pay rental upon being warned by a representative of the relevant government department in

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> Johore that its factory was operating illegally and in breach of an express condition of title. The land in question was agricultural land and was subject to an express condition that it was to be used for the cultivation of pineapple and rubber only.

[19] The Federal Court held that a tenancy agreement allowing the use of

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the land in question in contravention of the express condition of title of the land was null and void for illegal consideration under s. 24 of the Contracts Act 1950.

[20] We will refer to *Singma* in greater detail later on in this judgment. A

The Appeal

[21] In the High Court, the learned JC framed three issues for consideration and they were as follows:

(a) whether Bellajade as plaintiff had *locus* to prosecute its claim under the tenancy agreement, in the light of the fact that it had assigned its rights and title to, and interest in, the tenancy agreement to OCBC Bank; B

(b) whether the tenancy agreement was illegal and void *ab initio* on the basis that the contemplated use of the premises contravened an express condition of title, and consequently whether CME was liable to pay the outstanding rental under the tenancy agreement, or whether it was entitled to recover payments of rental previously made; and C

(c) whether the guarantor was liable under the guarantee to Bellajade the plaintiff for the arrears in rental and the failure of CME to fulfil its payment obligations under the tenancy agreement. D

[22] However, before us the sole issue for consideration was issue (b) that is:

> whether the Tenancy Agreement was illegal and void *ab initio* on the basis that the contemplated use of the premises contravened an express condition of title, and consequently whether CME was liable to pay the outstanding rental under the Tenancy Agreement, or whether it was entitled to recover payments of rental previously made. E

[23] There was no cross-appeal on the learned JC's finding in respect of issue (a), that the plaintiff did not lack *locus standi* to prosecute the claim. F

[24] Parties too agreed with the learned JC's finding in respect of issue (c) insofar as it related to his finding that the guarantee of tenancy agreement is both a contract of guarantee and indemnity. Whether the second defendant is liable under the guarantee agreement to the plaintiff would depend on our finding in respect of issue (b). G

[25] We have considered very carefully the submissions of learned counsel, the appeal records and the learned JC's judgment and we are unable, with respect, to agree with the learned JC's decision.

[26] The learned JC erred, in our view in holding that the facts in *Singma* were directly on point with the issues at hand. In so holding, the learned JC failed to judicially appreciate that the facts in the present case are clearly distinguishable from the facts in *Singma*. H

[27] The facts in *Singma* were, as stated by the Federal Court, simple and straight forward. The appellant, Singma Sawmill Co Sdn Bhd (Singma) had let to the respondent, a portion of its land together with a factory building erected thereon for three years, at a monthly rental of RM3,000 payable in I

advance, "solely for the purpose of operating a factory". The respondent stopped paying the rent after they were warned by a representative of the relevant department of the State Government that it was operating the factory illegally and in breach of the express condition. The department informed Singma of the breach and requested it to remedy the situation but this was ignored by Singma who insisted that the respondent continues to pay the rent. It was not disputed that the subject land was agricultural land with the express condition that it was to be used for the cultivation of pineapple and rubber.

[28] It was also not disputed that Singma had, prior to entering into the tenancy agreement with the respondent, applied unsuccessfully to change the category of land use from agriculture to industry.

[29] In view of Singma's wilful disregard of the State Government's request, the collector exercised his power under s. 128 of the National Land Code (the NLC) and issued a Form 7A notice to Singma requiring them to remedy the breach and demolish the factory.

[30] It was in the context of the aforesaid factual matrix that the Federal Court held that a tenancy agreement allowing the use of land in contravention of the express condition of title of the land is void for illegal consideration. As declared by the Federal Court:

> In the present case, the breach of the express condition is wilful, if not, contumacious. **There is a clear intention on the part of the appellants to use the subject-matter of the agreement ie, the land on which the factory was created, for an unlawful purpose.** The object of the express condition is that the land must be cultivated with rubber and pineapple, the category of land use is agriculture, and any unilateral conversion to industry is not permitted. Indeed neither party had power to waive the express condition which inextricably runs with the land. If that is permitted it would be entirely to ignore the object of the express condition which is for the public good and to defeat the law relating to land use. The appellants are deemed to have been aware of the illegality of the agreement when they entered it and therefore section 66 of the Contracts Act cannot assist them. (emphasis added)

[31] The Federal Court's decision was premised on the following ground that is, that the wilful contravention of the express condition of the land in question rendered the tenancy agreement unlawful:

(i) for being forbidden by law (see s. 24(a) of the Contracts Act 1950); and/or

(ii) where permitting the agreement to be valid would have the effect of defeating the law (see s. 24(b) of the Contracts Act 1950).

Section 24 of the Contracts Act 1950 stipulates, *inter alia*, that the consideration or object of an agreement is lawful, unless:

(a) it is forbidden by law; or

(b) it is of such a nature that, if permitted, it would defeat any law. A

[32] In reaching its conclusion, the Federal Court appeared to rely on the case of *Arumugam v. Somasundaram* [1933-34] FMSLR 322 and the Indian case of *Moti Chand v. Ikram-Ullah Khan* AIR 1916 PC 59. In both these cases, the agreements in question were similarly held to be void and unenforceable, for being forbidden by law or if permitted would have the effect of defeating the policy of the relevant law. B

[33] The crucial question that arises here then, is whether the same could be said of the tenancy agreement entered into by the parties in the present case given the facts pertaining hereto. C

[34] In other words, in the light of the facts of our case can the tenancy agreement be said to be similarly void and unenforceable:

(a) as being forbidden by law; and/or

(b) is of such a nature that, if permitted, would have the effect of defeating the law, D

in view of the fact that the said premises are being let for the purposes specified in section H of schedule 1 of the tenancy agreement namely:

> Lounge, private club, recreational premises and entertainment/ recreational bistro, convenient shop, café, hair saloon, fitness centre, clinic, laundry, beauty saloon, florist, banking services and facilities, food court, fast food outlets and office. E

when the express condition of title of the land is residential.

[35] An examination of the facts including the factual background leading to the execution of the tenancy agreement is necessary to answer the aforesaid question. F

[36] For this purpose, we set out in chronological order the facts of the present case:

(a) As stated earlier, on 26 March 2012, the plaintiff and Orion entered into a sale and purchase agreement (SPA) whereby the latter sold the said premises to the plaintiff. At the time of the SPA between the plaintiff and Orion, the land had been submitted for surrender, re-alienation, amalgamation and conversion of land use (from residential) to commercial under s. 204D of the NLC. G H

[37] This can be seen from para. F of the preamble to the SPA which states as follows:

> F. The Land has been submitted for Surrender, Re-alienation, Amalgamation and Conversion of Land use to commercial under s. 204D of National Land Code by the Registered Proprietor to Pejabat Pengarah Tanah & Galian Wilayah Persekutuan Kuala Lumpur … I

[38] The registered proprietor referred to in para. F was Kris Angsana Sdn Bhd (Kris Angsana), from whom Orion had purchased the nine pieces of land referred to earlier (the land) prior to the entry of the SPA with the plaintiff on 26 March 2012.

[39] Kris Angsana had on 1 December 2011 applied to the Land Administrator of Kuala Lumpur for the surrender, re-alienation and change of use of the land to "commercial" and "mixed development".

[40] Orion had purchased the land which consisted of Block A Commercial Building known as Plaza Palas and Block B which consists of 26 units of service apartments.

[41] The plaintiff however purchased only Block A or Plaza Palas (the said premises) from Orion.

(b) On 8 May 2012 the State Authority for Wilayah Persekutuan approved the registered proprietor's (Kris Angsana) application for the "surrender, re-alienation, amalgamation and conversion of land use" pursuant to s. 204E of the NLC.

The change of use thereof was to "commercial" and "mixed development" from "residential."

(see the letter of 16 November 2015 from Pejabat Pengarah Tanah & Galian Wilayah Persekutuan)

(c) By a letter dated 9 May 2012 the Land Administrator of Kuala Lumpur notified the registered proprietor (Kris Angsana) of the State Authority's approval and of the change of express condition and requested for a total payment of RM1,550,172 with the enclosed Borang 5A under s. 81 and s. 82 of the NLC. The amount included the sum of RM1,531,179 as premium for the change of use.

(see the letter of 16 November 2015 from Pejabat Pengarah Tanah & Galian Wilayah Persekutuan)

(d) On 27 November 2012 the Dewan Bandaraya Kuala Lumpur (DBKL) issued the Certificate of Fitness of Occupation (CFO) for the said premises. The CFO was for the said premises and the adjacent 24 storey condominium block. It reads:

> Dengan ini bangunan seperti berikut:
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> Pembangunan 1 Blok Pejabat 23 Tingkat Dan 1 Blok Pangsapuri 24 Tingkat (76 Unit) Dengan 4 Tingkat Besmen Tempat Letak Kereta Serta Kemudahan di Lot 45, 46, 50, 51, 53, 57, 58 Dan Sebahagian Rezab Jalan (Cul-De-Sac) Seksyen 88, Lorong Palas Off Jalan Ampang, Kuala Lumpur
>
> diberi kebenaran untuk diduduki dan digunakan bagi maksud yang ternyata di dalam pelan bangunan yang diluluskan oleh Datuk Bandar Kuala Lumpur.

(e) On 18 February 2013, upon payment of the full premium of RM1,531,179 on 14 February 2013, the Pengarah Tanah dan Galian, Wilayah Persekutuan Kuala Lumpur (PTG) issued the "Sijil Pengesahan Kelulusan Permohonan Di Bawah ss. 124, 124A, 137, 142, 148, 197, 200 Atau 204D Kanun Tanah Negara" to reconfirm the State Authority's approval of the change of use under s. 124 and subdivision and re-alienation under ss. 124A, 137, 142, 148, 197, 200 and 204D.

(f) On 20 February 2013, the plaintiff paid the balance of the full purchase price of RM139,250,000 and thereby completed the purchase of the said premises.

(g) On 21 February 2013, the plaintiff and the first defendant entered into the tenancy agreement for a three-year term.

[42] Thus, based on the aforesaid facts, it is clear that at the time the plaintiff entered into the tenancy agreement with the first defendant or rather at the inception of the tenancy agreement, the express condition had for all intents and purposes been changed from residential to "commercial" and "mixed development".

[43] As seen from the above narration of facts, at all material times when the tenancy agreement was signed on 20 February 2013 the full premium payable for the conversion of land use, which was approved in May 2012 had been paid. This was evident from the Sijil Pengesahan Kelulusan Permohonan *(supra)* which confirmed that full payment of the premium for conversion was paid on 18 February 2013.

[44] What remained to be done were the formalities of endorsement of change in express condition in the newly issued document of title.

[45] The learned JC was however of the view that "the fact that the process of conversion had been commenced did not change the fact that the express condition of title prohibited the use of the building for the purposes specified in section H of schedule 1 of the tenancy agreement."

[46] With due respect to the learned JC, it is not quite accurate to state that the process of conversion had been commenced when on the facts as set out above, the process of conversion was essentially completed at the time the tenancy agreement was entered into, save for the formalities of endorsement of change in the express condition in the newly issued document of title.

[47] The PTG had on 18 February 2013 reconfirmed the State Authority's approval of the application for surrender, re-alienation, amalgamation and change of use under s. 204D of the NLC. The condition attached to the granting and approval of the application, that the applicant must pay the premium for the change of use ("from residential to "commercial" and mixed development") together with other charges amounting to RM1,550,172 had been fulfilled. It has been confirmed that this amount has been paid in full on 14 February 2013.

A What remained pending was merely the administrative process of endorsing the State Authority's approval on the new titles.

[48] In other words, with the fulfilment of the condition of approval by the plaintiff the previous express condition of "residential" endorsed on the old titles of the land had in reality been effectively and substantially extinguished
B and replaced with the new express condition of "commercial" and "mixed development". In fact, this was the view expressed by Harun J (as he then was) in the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 FC when His Lordship held as follows:

C

> Section 124 deals with conversion and that if it is approved the effect will be to change the express condition imposed on the land.

[49] Harun J's view was upheld by the Federal Court but with Suffian LP making the following observation when answering, *inter alia*, the question
D posed before the Federal Court, that is, whether the Land Executive Committee had power to make the developer to give up its freehold title and receive in exchange a 99 year lease:

> … the Committee may approve an application for variation of express condition as submitted, or it may approve it with amendment. If it
E approves it as submitted, the question of consent does not arise, as consent is implicit in the application.
>
> If it approves it with amendments, the consent of the applicant is required, in view of the words I have italicised in subsection (4) of section 124 above.
>
> F In either case, **the committee must then direct the new or amended condition to be endorsed on the title.** (emphasis added)

[50] The relevant part of Suffian LP's observation is the part in bold and the part relied on by defendant's counsel to contend that the change (in express condition) is only legally effective when the change of use is endorsed
G on the title.

[51] Learned counsel's reliance on Suffian LP's observation to support their proposition is, in our view misconceived, as Suffian LP was merely reiterating the provisions of s. 124(4) of the NLC.

H **[52]** Section 124(4) states as follows:

> (4) The State Authority may approve any application under paragraph (c) of sub-section (1) either in the terms in which it was submitted or, with the consent of the applicant and any other persons or bodies whose consent thereto was required under the proviso to that sub-section, subject to such modifications as it may think fit, **and shall**, in **either case,**
I **direct as appropriate:**
>
> (a) the amendment of any condition or restriction in interest endorsed on the document of title to the land; or

(b) the endorsement on that document of title of a note of the amendment of any condition or restriction which is merely referred to therein; or

(c) the endorsement on that document of title of any new condition.

(emphasis added)

[53] Paragraph (c) of sub-s. (1) refers to an application for the amendment of any express condition or restriction in interest endorsed on, or referred to in the document of title or the imposition of any new express condition or restriction interest. (see s. 124(1)(c) of the NLC).

[54] Section 124(4) merely provides that if the State Authority approves an application under s. 124(1)(c) in accordance with the provision therein, then the State Authority shall direct, as appropriate, *inter alia*, that the amended condition or restriction of interest as the case may be, be endorsed on the title. The sub-section does not state that the change in condition is effective only upon endorsement of such change.

[55] In contrast, s. 124(2) provides that where the State Authority approves an application for an alteration in the category of land use under sub-s. (1)(a), it shall direct that the new category of land use be endorsed on the title and it may direct that there shall be endorsed on the title such new express conditions as are specified in the direction, and, as from the date on which the direction is carried into effect:

(i) **the land shall become subject to any conditions endorsed pursuant thereto and** (according to the category of land used so endorsed) **to the conditions implied by section 115, 116 or 117**;

(iii) there shall cease to apply to the land all conditions to which it was previously subject except those implied under section 114 and, where applicable, 118.

(emphasis added)

[56] Thus, in respect of change in category of land use, the conditions imposed, if any, upon approval of any application for such change, shall have effect only from the date the conditions are endorsed on the title. Whilst in the case of a change of express condition under s. 124(4) of the NLC the endorsement of the new condition on the title does not have any legal effect. It is merely an administrative requirement which the State Authority is statutorily bound to carry out.

[57] As the present case is concerned only with change in the express condition and not the category of land use (which remains building) then based on s. 124(4) it cannot be said that such change is only legally effective upon endorsement.

[58] Further, as held by Harun J *(supra)* once the State Authority approves the change of use under s. 124 of the NLC and the conditions of the approval (under s. 124(5) of the NLC) are satisfied, the change of use takes effect.

[59] The subsequent demand by the State Authority for additional premium of RM3,810,143.10 to be paid for the conversion on 5 September 2013 some seven months after the tenancy agreement, does not in our view alter the position. This is because the approval given on 8 May 2012 remained unrevoked and was in fact reaffirmed in the PTG's letter of 16 December 2015.

[60] Hence, well before the tenancy agreement commenced the express condition had inexorably changed upon approval of the application for change by the State Authority on 8 May 2012 and upon fulfilment of all conditions imposed including the payment of premium of RM1,531,179 on 14 February 2012.

[61] In this regard, the authorities relied on by the defendants in support of their proposition that the change in use is only effective upon endorsement, namely, *Dr Ti Teow Siew & Ors v. Pendaftar Geran-Geran Tanah Negeri Selangor* [1981] CLJ 134A; [1981] CLJ (Rep) 142; [1982] 1 MLJ 38 HC and *Toh Huat Khay v. Lim A Chang* [2010] 7 CLJ 261; [2010] 4 MLJ 312, FC can be distinguished.

[62] In *Dr Ti Teow Siew*'s case *(supra)* the primary issue for consideration was in relation to time at which alienation of a leasehold interest in land and a restriction-in-interest came into effect.

[63] The land in question was approved for alienation by the State Authority on 18 August 1964. At that time the State Authority had imposed and endorsed on the proposed document of title a restriction-in-interest as follows:

> The land hereby leased shall not be transferred or leased for a period of 16 years without the consent of the Ruler-in-Council.

[64] The court held that registration of title is the cornerstone of the Torrens System. Accordingly, the restriction-in-interest ran from the date of registration of the document of title at the Land Registry and not from the date of approval of alienation and endorsement of the restriction-in-interest which was done at the time of approval. In the court's view "the restriction-in-interest" could not have been commenced before the date of registration because the land remained State land and the restriction could not have meant to operate on the State Authority.

[65] The aforesaid case has no bearing on the present case essentially because it is concerned with initial alienation and not re-alienation. The present case is concerned with a change of use subsequent to initial alienation which is an issue which needs to be considered in the context of s. 124 of the NLC.

[66] As for the Federal Court case of *Toh Huat Khay (supra)* the facts can also be distinguished. The case concerned the fraudulent transfer of land in breach of a restriction-in-interest endorsed on the document of title of the land in question.

[67] The Federal Court in its judgment held, *inter alia*, as follows:

> The evidence showed that the said land was still subject to the said restriction in interest when it was transferred to the defendant. That being the situation, I am of the view that the said land, due to the restriction in interest endorsed on the document of title pursuant to s. 124(1)(b) of the Code, cannot be transferred by TKC to the defendant **unless TKC as proprietor had, prior to the transfer, applied to the State Authority** for the striking off or the rescission of the said restriction in interest. The defendant has not shown that such an application was made by TKC. (emphasis added)

[68] Although the Federal Court did go on to state that the mandatory requirements of s. 124(7) of the NLC must be complied with before the land in question can be transferred, that pronouncement must be looked at in the factual context of the case. In that case, the State Authority had purportedly consented to the transfer and the land in question was subsequently transferred from TKC (the registered owner) to the defendant six months after the former became the registered owner despite the restriction in interest which prohibited the land in question from being transferred for a period of ten years after it had been registered.

[69] As observed by the Federal Court, the land in question was still subject to the restriction in interest at the time it was transferred by TKC to the defendant. However as also pointed out by the Federal Court no evidence was led to show that TKC, as proprietor of the land in question, had applied to the State Authority for rescission of the restriction in interest pursuant to s. 124(1)(b) of the NLC and further no evidence was adduced to show the State Authority had approved such application, if any.

[70] This is in contrast to the present case where there was irrefutable evidence that, not only had an application been made for an amendment of the express condition but that approval had in fact been granted to such application by the State Authority well before the tenancy agreement was entered into. In addition, the condition of approval including the full payment of the premium for conversion had been fulfilled by the plaintiff by the time the tenancy agreement was signed.

[71] The defendant's reliance on s. 78(3) of the NLC and the cases of *North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor* [2011] 2 CLJ 392; and *Government of the State of Negeri Sembilan v. Yap Chong Lan & Ors And Another Case* [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144 is in our view misplaced.

[72] Those two cases deal with alienation of State land by the State Authority and when it takes effect, whether upon approval by the State Authority or upon registration. As expressly provided for by s. 78(3) of the NLC, alienation clearly takes effect only upon registration.

[73] We are here concerned with applications for change of use under s. 124(4) of the NLC, and when it takes effect under that section. Consequently, s. 78(3) and the cases of *North East Plantation* and *Yap Chong Lan* are not applicable to the present case.

[74] To sum up, for the reasons set out above, we are of the view that contrary to the findings of the learned JC, the tenancy agreement is not tainted with illegality as:

(a) it is not forbidden by law; and/or

(b) it is not of such a nature that if permitted, it would defeat the law applicable thereto (which in our case is the NLC)

as the approval by the State Authority of the change of use on 8 May 2012 coupled with the fulfilment of the conditions imposed upon such approval, in particular the full payment of the premium imposed for conversion on 14 February 2013 effectively and substantively resulted in a change of use of the land from "residential" to "commercial" and "mixed development".

[75] The issuance of the CFO by the DBKL on 27 November 2012 provides further evidence that the old condition (of "residential") has been effectively and substantively changed to "commercial" and "mixed development" following the approval of the change of use by the State Authority on 8 May 2012.

[76] As submitted by learned counsel for the plaintiff, there is consistency and accord between DBKL's CFO and the condition of use of the land on which the said premises is erected. The CFO is issued by DBKL under the Building (Federal Territory of Kuala Lumpur) By-Laws 1985 thus confirming that the said premises were constructed as per the approved building plans and that the building is fit for use for the particular purpose it was built which in this case is commercial.

[77] Accordingly the learned JC erred in our view when he held that the issuance of the CFO on 27 November 2012 had no bearing on the express condition.

[78] It does not stand to reason to contend that notwithstanding the approvals (by the State Authority), the authorisation and mandate (by the DBKL), the plaintiff and the first defendant were as a matter of law prohibited from using the said premises for commercial purpose.

[79] For these reasons, we agree with learned counsel for the plaintiff that the learned JC had misdirected himself in law and in fact in basing his decision on the endorsement of the express condition of the titles without

taking into consideration the events that had taken place prior to the entry of the tenancy agreement, in particular the approval by the State Authority of the change in use of the land as evidenced by the "Sijil Pengesahan Kelulusan Permohonan Di Bawah ss. 124, 124A, 137, 142, 148, 197, 200 Atau 204D Kanun Tanah Negara", dated 18 February 2013.

[80] The learned JC erred in failing to recognise that the approval of the change of use by the State Authority meant that for all intents and purposes the "old express condition" of "residential" on the titles of the land had effectively and substantively been changed to commercial and mixed development.

[81] Consequently, the learned JC erred when he found that the tenancy agreement was illegal on the basis that the contemplated use of the said premises as specified in section H of the tenancy agreement contravened the express condition of title of the land.

[82] In light of the State Authority's approval of the change in use on 8 May 2012 which was subsequently confirmed on 18 February 2013 it cannot therefore be said that the contemplated use of the said premises as specified in section H of the tenancy agreement was illegal for being in contravention of the express condition.

[83] The learned JC also failed to take into consideration that if the tenancy agreement herein was clearly in contravention of the express condition, the relevant department of the State Government would have, as they had done in *Singma*, taken action against the plaintiff either under s. 128 or some other relevant provision of the NLC.

[84] No such action has thus far been taken against the plaintiff by the Land Office or the PTG's office in respect of the tenancy agreement.

[85] For all the above reasons, we find that the learned JC's decision was plainly wrong on the facts and law thereby warranting our appellate intervention.

[86] We therefore unanimously allow the appeal with costs and set aside the learned JC's decision. The plaintiff's claim was set out in para. 10 of the statement of claim (at p. 53 of the record of appeal (A), Jld. 1) is accordingly allowed.

[87] For completeness, we would like to address the learned JC's finding on the counterclaim. As we found the tenancy agreement to be valid and enforceable, the defendant's counterclaim premised as it were on the illegality of the tenancy agreement, is no longer viable and is accordingly dismissed.

[88] Nevertheless, even if we were to agree with the learned JC and find the tenancy agreement illegal and void *ab initio*, we are of the view that the learned JC's finding that the first defendant did not know of the contravention of the express condition at the time it entered into the tenancy agreement was, on the facts, erroneous.

[89] This is what the learned JC said in his judgment:

> 34. CME in its counterclaim sought for the return of the sums previously paid as rental under the Tenancy Agreement, on the basis of section 66 of the Contracts Act 1950. Section 66 provides:
>
> > When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.
>
> 35. From the perspective of CME, the Tenancy Agreement was an agreement that it had discovered to be void, as it was not aware prior to conducting the land searches that the use of the premises as contemplated by the Tenancy Agreement contravened the express condition of title.
>
> …
>
> I accordingly allowed CME's counterclaim against the plaintiff …

[90] Where s. 66 is applied to an agreement "discovered to be void", the court must examine the facts of the case to determine whether the party was aware of the illegality at the time the agreement was entered into (see *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 CLJ 141; [2014] 3 MLJ 301). In order to invoke s. 66, the invalidity of the agreement should be discovered subsequent to its making. The section only applies where a party enters into an agreement under the belief that it was legal, and not where the illegality was known from the beginning (see *Ahmad bin Udoh & Anor v. Ng Aik Chong* [1969] 1 LNS 5; [1969] 2 MLJ 116).

[91] The court must also consider whether in all circumstances the agreement was concluded in good faith; "The question that must necessarily be decided is whether in all circumstances of this particular case it is proper to order restitution" (see *Wong Yoon Chai v. Lee Ah Chin* [1980] 1 LNS 132; [1981] 1 MLJ 219).

[92] In the present case, the solicitors for the first defendant in the tenancy agreement, Messrs Faizah Lim & Associates, had earlier acted as solicitors for Orion in the SPA between Orion and the plaintiff. The solicitors' awareness of the condition on the land, and the application for conversion thereof, is evident from their letters dated 14 February 2013 and 19 February 2013, respectively enclosing the payment receipt for the premium for conversion and the Certificate of Approval (Sijil Pengesahan Kelulusan) by the State Authority. The tenancy agreement was only subsequently entered into by the parties on 21 February 2013.

[93] As solicitors, Messrs Faizah Lim & Associates could not have been ignorant of the fact that the use of the said premises as contemplated by the tenancy agreement was in contravention of the express condition. It is well-settled that the knowledge of a solicitor is regarded by law as the knowledge of the client, except where the solicitor had acted fraudulently (*Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30; [1975] 1 MLJ 85).

[94] Constructive knowledge of the breach of the express condition, at the time the tenancy agreement was entered into, can be imputed upon the first defendant, thus rendering the first defendant in *pari delicto*. As such, the first defendant is precluded from seeking recourse by virtue of restitution under s. 66, and the learned JC had erred in allowing their counterclaim against the plaintiff.